



Recommendation 76-2

Strengthening the Informational and Notice-Giving Functions of the Federal Register

(Adopted June 3-4, 1976)

The primary role of the Federal Register is the publication, as required by the Federal Register Act and the Administrative Procedure Act, of legal documents that affect people generally, such as descriptions of agencies' organization and functions, texts of substantive and procedural rules, notices of proposed rulemaking, and statements of general policy or interpretations of general applicability formulated and adopted by agencies. The Office of the Federal Register serves as an official depository for the filing of these documents, and their publication in the Federal Register provides the public with notice of their contents. Paragraphs A and B of the Recommendation seek to strengthen this informational function of the Federal Register.

The secondary role of the Federal Register is the publication of notices pertaining to adjudicatory matters. Statutory requirements and agency practices with respect to the publication of these notices conform to no pattern but vary widely among agencies and among different types of adjudicatory proceedings. Since the establishment of the Federal Register, Congress has enacted a considerable number of statutes that specifically require agencies to publish in the Federal Register notices of applications, hearings or decisions in adjudicatory proceedings. In addition, agencies have often obtained the approval of the Director of the Federal Register to publish in the Federal Register notices pertaining to adjudicatory matters despite the absence of an express publication requirement. Paragraphs C and D of the Recommendation seek to define and strengthen this notice-giving function of the Federal Register.

Recommendation

A. Preservation of Documents in the Code of Federal Regulations

The Administrative Committee of the Federal Register should require each agency to the maximum extent practicable to preserve in the Code of Federal Regulations documents of general applicability that are published in the Federal Register and are of continuing interest to



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the members of the public. Particularly, actions should be taken to the extent practicable in the following areas:

1. The Administrative Committee should act to preserve in the Code of Federal Regulations descriptions of each agency's organization and functions required to be published in the Federal Register under sections 552(a)(1)(A) and (B) of the Administrative Procedure Act. All agencies should inform the public of their organization and functions by publishing complete and informative descriptions in each year's edition of the Code of Federal Regulations. Subsequent changes in an agency's description of its organization and functions should appear in the Rules and Regulations section of the Federal Register where the codification system adopted for use in the Code controls the order of publication and provides a useful finding aid for subsequent developments.

2. The Administrative Committee and the agencies should act to preserve in the Code of Federal Regulations those statements of basis and purpose (or portions thereof) accompanying the publication in the Federal Register of newly promulgated rules that are of continuing interest to members of the public. If the preservation of an agency's basis and purpose statements in successive editions of the Code of Federal Regulations is likely to become cumbersome, the texts of the statements prepared by that agency during each preceding year should be reprinted only once in that year's edition of the Code of Federal Regulations, either at the end of the title or chapter assigned to the agency or in a special Code volume with statements from other agencies, so subscribers to the Code are at least able to preserve the statements in composite, bound form. Additionally, the annual editions of the Code of Federal Regulations should supply the Federal Register citations to pending rulemaking proceedings that affect present regulations or add new regulations.

B. Publication in the Federal Register of Statements of General Policy and Interpretations of General Applicability

Despite the requirement of section 552(a)(1)(D) of the Administrative Procedure Act that each agency currently publish in the Federal Register for the guidance of the public those "statements of general policy or interpretations of general applicability formulated and adopted by the agency," surprisingly few such policy statements and interpretations are in fact published in the Federal Register. Each agency should review its practices and take necessary measures to insure the publication in the Federal Register of all agency statements of general policy and interpretations of general applicability. In addition, when an agency utilizes an adjudicatory opinion or an instruction to staff for the purpose of adopting a general policy or



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interpretation of general applicability, it should publish in the Federal Register the pertinent portion of the opinion or of the instruction, or it should promptly summarize the policy or interpretation in guideline form and publish it in the Federal Register. These policy statements and interpretations should be published in the Rules and Regulations section of the Federal Register and should be preserved in the Code of Federal Regulations when they are of continuing interest to the public.

C. Standards for Publication in the Federal Register of Notices Pertaining to Adjudicatory Matters

Congress should consider the following standards in determining whether to impose new requirements for the publication of notices pertaining to adjudicatory matters and in reviewing existing publication requirements. The Director of the Federal Register should also observe these standards in exercising his discretionary authority to allow the publication in the Federal Register of notices pertaining to adjudicatory matters that are not required by law to be published. In both instances agencies should not rely solely on the publication of notices in the Federal Register to afford notice to interested persons of adjudicatory matters if other forms of public notice are practicable.

1. The Federal Register should not routinely be used to publish the texts of agency orders and opinions in adjudicatory proceedings or notices of those decisions if there is no further opportunity available for interested persons to comment or otherwise to participate in the proceeding, except when such publication serves a necessary legal purpose. Statements of general applicability adopted by an agency in an adjudicatory opinion should be published in the Federal Register in accordance with paragraph B of this Recommendation. Supplementary agency publications that contain the texts of agency orders and opinions in adjudicatory proceedings should be listed in the Code of Federal Regulations at the head of the applicable title or chapter assigned to the agency and should be described in greater detail in the agency's regulations published in the Code.

2. The Federal Register should not be used to publish notices of applications, hearings and other adjudicatory matters unless the notices are public notices intended to inform interested members of the public who are not parties to the proceeding of the opportunity to comment or otherwise to participate in the proceeding. In addition, specific categories of public notices (for example, notices of applications or hearings under a specific statutory provision) should not be published if there is no substantial public interest in the proceedings or if the



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publication of the notices in the Federal Register is unlikely to inform interested persons about pending adjudicatory proceedings of which they would not otherwise receive notice.

3. The various categories of public notices of each agency should be listed and described in detail in the agency's regulations in the Code of Federal Regulations. The descriptions should designate which public notices appear in the Federal Register and which do not.

D. Format for Publication in the Federal Register of Notices Pertaining to Adjudicatory Matters

1. The Administrative Committee of the Federal Register should act to require that notices pertaining to adjudicatory matters that are published in the Federal Register adopt an appropriate public notice format. The notice that appears in the Federal Register should briefly inform interested persons of the nature of the proceeding, the agency's legal authority, the matters of fact and law asserted, and the opportunities available to comment or otherwise to participate in the proceeding and should designate an agency official interested persons may contact for additional information. The published notice should not ordinarily contain the text of any agency order or opinion or a detailed recitation of the legal or factual contentions of the agency or other parties to the proceeding.

2. If a notice pertaining to an adjudicatory matter is published in the Federal Register, it should be published as early in the proceeding as practicable (e.g., at the time an application is filed rather than solely when the agency orders a hearing on the application). An agency may also highlight specific applications or hearings where public participation is particularly important by publishing notices thereof in the Federal Register even though the agency does not publish notices of other applications or hearings under the same statutory provision.

Citations:

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